statute.[60]

2. The Adverse Repercussions That Would Stem From The FCC's Preemptive and Highly Detailed, Inflexible Approach Are Well Documented in the Record.

Some parties contend that leaving issues "up in the air to be resolved by the states will inevitably complicate and lengthen the negotiation process...and will impair the states' ability to resolve disputed issues within the highly constrained time periods provided by § 252..."[61] Once again, this position is based upon an erroneous assumption that states have not yet acted to carry out the requirements of the 1996 Act.

To the contrary, as many parties recognize, the FCC's prescriptive approach will "set back progress and cause additional delay and regulatory expense." [62] The FCC's proposed rigid, detailed rules would "constrain those states that have already undertaken to open their local markets and would act as insurmountable barriers to those states on the threshold of opening their markets."[63] "...[T]he rigid rules proposed by the FCC would definitely undermine the initiatives taken by Maryland. ...Any changes in these policies would have a profound, disruptive effect on competition in Maryland." Id. at p. 10. Displacement of state regulations could result in a traffic jam on the information superhighway, causing delay,

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[60]Comments of Sprint, p. 1 ("Given the time constraints for the promulgation of initial rules, the Commission should initially establish a presumption that interconnection at local and tandem switching points is technically feasible, and allow the states to resolve disputes regarding any additional requested points of interconnection, pursuant to the following guidelines...").

[61]See Comments of Sprint Corporation.

[62]Comments of the Maryland Public Service Commission at p. 7; Accord Comments of the Oregon Public Utility Commission at page iv ("Prescriptive rules from the FCC that would require all of this activity to be reevaluated would set back the development of competitive markets, contrary to the intent of Congress.").

[63]Comments of the Maryland Public Service Commission at p. 6..

confusion, uncertainty and unnecessary regulatory conflict.[64] "Prescriptive national access and interconnection rules would upset three years of careful, detailed work toward competition in Iowa."[65]

"The more detailed any mandatory specifications the Commission issues, the less efficient will be the outcomes of negotiations and State reviews, and the more disruption will occur in States, such as California, that have already aggressively encouraged competition.[66] Extensive, highly preemptive national requirements would actually inhibit competition in other ways by restricting the States' ability to respond appropriately to technological and market developments and regional differences.[67] "Detailed rules promulgated at the national level by the FCC could not adequately anticipate the unique operating characteristics of the Wyoming telecommunications system and could adapt only sluggishly to them as competition continues to develop."[68] Wyoming Public Service Commission at pp. 27-18.

The FCC's detailed technical requirements could have "distorting effects" which would not produce the same benefits as had the Commission merely sanctioned a uniform national process that will encourage private parties to decide for themselves.[69]

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[64]Comments of the Arizona Corporation Commission, p. 19.

[65]Iowa Utilities Board Comments at p. 4

[66]Comments of Pacific Telesis Group, p. 2.

[67]Comments of the Illinois Commerce Commission at p. ii.

[68]Wyoming Public Service Commission at pp. 27-28.

[69]Comments of Pacific Telesis Group at p. 7.

The FCC's approach will also stifle innovative ideas that exist in the states.[70] Many states have successfully used forums as a way to address network issues; such forums are best achieved at the state level which will no longer be possible with nationalized rules.[71]

In summary, the extremely detailed sweep of the rules proposed in the NPRM is unnecessary and counterproductive to swift and rational implementation of the Act.

C. Most Commenters Addressing the Issue Agree That The Act Permits States' To Impose Conditions on Non-Incumbent LECs And That The Absence of This Ability Could Disrupt State Competitive Policies

Other parties agree with the PaPUC that the 1996 Act does not foreclose the state commissions from imposing additional obligations on non-incumbent LECs.[72] States are in a

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[70]Comments of the Maryland Public Service Commission, p. 3; Accord Illinois Commerce Commission Comments, p. 10 ("Minimum rules would allow continued innovation and progress in and by the States."); Comments of the Florida Public Service Commission at p. 9 ("A 'one size fits all' approach stifles innovative ideas that exist within the states, and may actually impede development of competition."); Comments of the Colorado Public Utilities Commission, p. ii (Competition in the telecommunications industry is critical new ground for our nation and one in which the experience, expertise and creativity in the various States will likely lead to the best possible implementation of the goals of the 1996 Act.");

[71]Comments of the Illinois Commerce Commission, p. 11 (""This ability to bring together industry, regulators, and consumer groups for informal discussions can develop consensus and yield much higher quality information and results, in many instances, than would be likely through the FCC's national, more formal procedures."); Comments of the Arizona Corporation Commission ("The initial steps in furtherance of the Arizona Commission's process involved the creation of three task forces, comprised of appropriate regulatory, industry and consumer representatives."); Comments of the Colorado Public Utilities Commission at p. 23; Alabama Public Service commission Initial Comments at p 18; Initial Comments of the Maine Public Utilities Commission et al ("The [Utah] Commission held numerous technical conferences and meetings throughout 1994. This process resulted in the passage of the Telecommunications Reform Act by the Utah legislature during the 1995 session in February."); Comments of Pacific Telesis Group, p. 10.

[72]Comments of the Illinois Commerce Commission, p. 18; See also Comments of the California Public Utilities Commission.

better position to determine the additional rules and obligations that new LECs should be required to meet.[73] Comments of the Illinois Commerce Commission, p. 20. "Concluding that the FCC should not impose reciprocal obligations does not foreclose the State commissions from imposing additional duties on new LECs if policy goals are furthered by the imposition of such obligations."[74]

The California Public Utilities Commission notes that "[b]y not allowing the states to impose any of the requirements of section 251(c) and (d) on non-incumbent LECs, the FCC would preclude the states from imposing symmetrical obligations where there is prior experience demonstrating that in selective circumstances, symmetrical obligations promote efficient negotiations. ...While most new entrants have experienced significant delays in states where interconnection negotiations were ordered without a framework, California's imposition of symmetrical requirements for some interconnection terms has resulted in none of the negotiations requiring arbitration." Id. at p. 13.

Similarly, the Colorado Public Utilities Commission states that it determined it would be appropriate to allow a three-year period, from the time a new entrant was granted its certificate of public convenience and necessity to enter the local exchange market, that the new entrant would automatically be exempt from certain of the rules applicable only to the incumbent local exchange providers. However, at the end of the three-year period, a new entrant will be required to demonstrate to the Colorado Public Utilities Commission that an exemption from

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[73]Comments of the Illinois Commerce Commission at p. 20.

[74]Id. at p. 19 ("For example, the ICC imposed intraLATA presubscription and line-side interconnection requirements on new LECs for policy reasons, not because of the incumbent LECs' arguments that if they should have to provide intraLATA presubscription and line-side interconnection then the new LECs should as well.")

these rules is still required to foster competition. The Colorado Commission states that its review is on a case-by-case basis.

Pacific Telesis Group agrees that the statute in no way limits the authority of state commissions to impose Section 251(c) duties on any carrier. On the contrary, as we read Section 251(d)(3), the Commission may not interfere with State rules that impose 'access and interconnection obligations' on all similarly situated local exchange carriers, unless the rules are otherwise inconsistent with the Act. Id. at p. 16.

Only a few parties argue that the Commission should preempt a state's ability to impose additional terms and conditions as needed in response to local concerns and conditions upon LECs other than ILECs.[75] For instance, Sprint argues that it would be inconsistent with § 251(h)(2) for the FCC to delegate that responsibility to the states. Id. at p. 10. Similarly, MFS argues that "there would have been no need for the enactment of Section 251(h)(2) if the states were able to decide on their own to subject any LEC to the duties of an 'incumbent'". Id. at p. 10 The Commission should dismiss these arguments. In addition to the plain language of the Act not prohibiting State authority in this regard, strong policy considerations weigh in favor of this interpretation. Additionally, an argument can certainly be made that the Commission is required to recognize these additional obligations imposed by state commissions under § 251(d)(3).[76]

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[75]Comments of Sprint Corporation at p. 10.

[76]Accord Comments of the People of the State of California and the Public Utilities Commission of the State of California on the Notice of Proposed Rulemaking, p. 12.

D. Enforcement Responsibilities Over Intrastate Interconnection and Access Policies Should be Carried Out By State Commissions.

A few parties argue that since conduct violative of the LECs' duties could occur after the state commission's role of arbitrating and approving agreements has been completed, the FCC should assume continuing enforcement responsibilities under the Act.[77] Some parties suggest that the Commission "may wish to refrain from acting on complaints that relate to the state approval process and court review thereof, but that it should stand ready to hear complaints regarding other aspects of § 251.[78]

PaPUC maintains that particularly with regard to intrastate interconnection policies preserved under § 251(d), states would be in the best position to process complaints and enforce interconnection agreements between ILECs and their competitors. Since the states are the primary "implementing agency" under the Act, it would make most sense for states to handle carrier complaints arising from the final agreements which they approve. Further, since the state will be undertaking a review in conjunction with complaints regarding intrastate policies, it would probably be most expedient if carriers could lodge the interstate aspects of their complaints with the state also, rather having to go to another forum.

III. Many Parties Agree That the Commission's § 251 Authority Does Not Give It the Authority to Dictate Individual State Costing and Pricing Methodologies Under Section 252(d).

Most of the comments reviewed by the PaPUC opposed the FCC's tentative conclusion that it has authority through § 251 to mandate the individual costing and pricing methodologies

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[77]See Comments of Sprint, p. 8.

[78]Comments of Sprint Corporation, pp. 8-9.

used by states under § 252.[79] The statute cannot be read to permit, let alone require, the Commission to establish pricing principles for the states to apply in carrying out the state's responsibilities in arbitrating agreements.[80]

Some parties argue that the Commission can or should set national pricing standards.[81] However, they offer little to no support for the proposition that the FCC has this authority in the first place. For instance, CompTel appears to simply "presume" that the Commission has this authority under §§ 251(c) and 252(d).[82] MFS relies upon §§ 251(c)(2) and (c)(3) which

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[79]Accord Comments of GTE Service Corporation, p. 59 ("As explained in section 1 of these Comments, GTE does not agree that § 251 of the 1996 Act permits the FCC to establish mandatory pricing standards that states must use in determining rates for interconnection and unbundled network elements."); Comments of the Colorado Public Utilities Commission at p. 31 ("It is the CoPuC's opinion that the 1996 Act clearly gives the States the responsibility of approving or disapproving the rates, terms and conditions for interconnection, unbundled network elements, wholesale services, and reciprocal compensation arrangements. The FCC is asked only to intervene if a State does not act or acts in opposition to the 1996 Act."); Florida Public Service Commission Comments at p. 25 ("However, we do not believe that the Act gives the FCC explicit authority to establish pricing principles which the states must apply in establishing rates for interconnection, unbundled network elements, or collocation."); Comments of the Iowa Utilities Board, p. 6 ("Having taken the view that the provisions of section 252 are directed to states and contain adequate standards, the Board suggests the rules proposed in these paragraphs are unnecessary, pose confusing and duplicative standards, and should not be pursued."); Comments of Pacific Telesis Group, p. 62 ("We have already stated our view that the 1996 amendments gave the FCC no new legal authority to determine rates for intrastate services."); NYNEX Comments at p. 41 ("The Commission should not attempt to prescribe rate levels or rate structure for interconnection under Section 251 of the Act."); Connecticut Department of Public Utility Control Comments at p. 13 ("For the reasons cited above in section A of these Comments, CTDPUC respectfully disagrees with the commission's conclusions, and asserts that state commissions such as Connecticut must have the ability to enact their own pricing policies in order to accomplish state-specific goals and recognize state-specific policies."); Comments of the Rural Telephone Coalition.

[80]Comments of the Massachusetts Department of Public Utilities, p. 4.

[81]See Comments of Sprint at p. 41.

[82]See CompTel Comments at p. 75.

"expressly require that rates be established in accordance with § 252", to infer that the Commission has authority to adopt rules for states to follow in implementing the pricing standards contained in § 252(d).[83]

1. FCC Authority To Establish A Nationwide Uniform Costing and Pricing Methodology Is Not Supported By the Plain Language of the Statute or Well Established Principles of Statutory Construction.

As we pointed out in our initial Comments, the mandate to states in Section 252(d) to ensure that interconnection rates are priced in accordance with the criteria set out in the statute is very specific. Neither §§ 251 or 252 bestow upon the Commission the same authority vested to states to determine the "justness and reasonableness" of interconnection rates through application of the specific standards contained in § 252(d). In the words of one party, "conspicuously absent from the statutory framework is the requirement that states adopt pricing approaches consistent with the Commission rules under § 251."[84] The language of § 252(d) could not be clearer. Section 252(d)(1) states in relevant part:

> "...Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--(A) shall be --(i) based on the cost...and (ii) nondiscriminatory, and (B) may include a reasonable profit. (Emphasis added).

Further, § 252(c), which enacts the standards for arbitration, generally directs the states to ensure compliance with the Commission's Section 251 rules. However, the subsection deals separately with pricing and requires state arbitration only to 'establish any rates for

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[83]MFS Comments at p. 48.

[84]NYDPS Initial Comments at p. 10.

interconnection, services, or network elements according to subsection (d) of § 252. Subsection (d) in turn prescribes pricing standards for determinations by a State Commission and as just discussed contains no provision for Commission implementing or interpretive rules.[85]

Similarly, the language used at §§ 252(c) and (f) also do not support the FCC's interpretation that it has the authority to set pricing and costing standards under the Act. The language at § 252(c) requires a State commission resolving a compulsory arbitration under § 252(b) to "ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to section 251, and ensure that interconnection conform to the pricing standard of § 252(d). The language of 252(f) pertaining to state commission review of BOC Statements of Generally Available Terms provides that a state commission must determine whether the statement complies with § 251 and the regulations promulgated by the FCC thereunder, and with § 252(d). The Act is silent with respect to any regulations promulgated by the FCC under § 252(d), the specific costing and pricing provisions of the Act, because this authority was given to the states not the FCC.

The FCC argument that it derives its authority to set national "pricing guidelines" is based largely upon the very general language of §§ 251(c) and (d) of the Act. Section 251 establishes the interconnection obligations of all carriers and does not bestow authority upon the FCC to establish pricing and costing methodologies.

The FCC's position is not supported by either the plain language of the statute or well established principles of statutory construction.

First, where Congress intended that their be uniformity or that guidance by the FCC was

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[85] Accord Comments of the Rural Telephone Coalition at p. 6.

necessary (i.e., number administration etc.), it expressly stated this within the specific provisions of § 251. The obligations of ILECs contained at §§ 251(c) and (d) to offer services at just and reasonable rates make no mention of Commission implementing regulations. If the Commission's interpretation was correct, the language contained in §§ 251(b)(2), 251(c)(4), 251(e) and 251(g) that such obligations be implemented through "requirements prescribed by the Commission" would have no meaning, or would be superfluous. Therefore, the Commission's interpretation must fail.

Second, the Commission is also arguing that its prescriptive authority arises by implication. For reasons stated previously in these Comments, the FCC's attempts at implied preemption are contrary to the express language of at least two provisions of the Act, i.e., §§ 251(b) and 251(d)(3) and, therefore, must fail.[86]

Third, as discussed above, when a court considers the intent behind a provision in a statute, it does so within the context of all of the Act' provisions as a whole. It is apparent when §§ 251 and 252 are read together and considered as a whole, that the FCC's interpretation would render the state's responsibilities under § 252 superfluous, which violates well established principles of statutory construction.

Fourth, principles of statutory construction also instruct that where there are two conflicting provisions in a statute, which we do not believe there are in this case, the more specific language will prevail over the provision which contains the more general language. In this instance, the FCC is relying not only upon the very general language contained in § 251 of the statute but it is also obtaining its authority indirectly through provisions which establish

[86]Accord Comments of the Alabama Public Service Commission at p. 20.

obligations upon the ILECs. Moreover, as pointed out by the New York State Department of Public Service, the words relied upon by the Commission are "terms of art and do not act to confer federal jurisdiction over intrastate rates."[87]

Fifth, in order to arrive at the FCC's interpretation, one must presume that § 152(b) does not apply to §§ 251 and 252 of the Act. However, this argument loses its merit when one considers that Congress did not expressly exempt §§ 251 or 252 from § 152(b)'s application, as it as done in the past when it desired to changed the jurisdictional mix of state/federal authority under the Act.[88]

Sixth, Section 252(c)(5) states that the FCC will act if a state does not. This implies that there will be preemption only if a state fails to act. "The overall emphasis seems to be that the States have jurisdiction over all matters not explicitly given to the FCC or some other agency, but there is a caveat that a state forfeits its jurisdiction to the FCC for failure to act."[89]

Finally, given § 251's timeframes, it is impossible that any Commission-mandated costs analyses or models could be usefully applied.[90]

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[87]Comments of the New York State Department of Public Service (citing Penzoil v. Federal Energy Regulatory Commission, 645 F.2d 360, 379 n.37 (1981).

[88]Accord Comments of Pacific Telesis Group, p. 8 ("...Section 252 of the Act specifically charges State commissions with 'determining' local rates, while two other complementary sections -- 2(b) and 251(d)(3) -- specifically fence off State rates and rules from the FCC's authority. Concrete national standards for local prices would offend principles of Federalism that are at the heart of the Act, both as originally enacted in 1934, and as amended in 1996.")

[89]Comments of the Florida Public Service Commission at p. 9.

[90]See Initial Comments of the New York State Department of Public Service, p. 22 ("...[S]tates could be forced to put requested arbitration on hold for almost two months awaiting commission 'guidance' and then have only three months for any required cost studies to be produced and reviewed and to approve the final product.").

1. **Congress Did Not Provide For Nationalized Pricing and Costing Methodologies For Sound Policy Reasons.**

The adverse impact of uniform national pricing and costing methodologies was discussed by many other parties. Upon review of many of the Comments on this issue, it is very apparent that it is extremely difficult to separate the wholesale pricing and costing function from the retail rates charged end-users, a function which even the FCC acknowledges the states retain authority over.

National rules would leave states little or no flexibility to influence network arrangements or set prices for intrastate services.[91] "...[S]tate regulators have set the retail prices of intrastate services to reflect societal goals that are as different as the Sates themselves are different, as well as to reflect complex differences in costs, service requirements, and network capabilities." Pacific Telesis Comments at p. 83. Even general mandates will substantially interfere with the States to set rates and charges for intrastate services, including local service. For example, Commission costing or pricing rules on interconnection, unbundling, termination of local traffic, collocation, or resale will, in effect, set major components of cost-of-service for carriers providing local service products.[92]

"...[I]f the Commission sets terms and conditions for intrastate products without regard to the contribution they have made to universal service burdens, or their cross-elasticity of demand with other intrastate products, it would destroy a balance delicately achieved in fifty

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[91]Comments of Pacific Telesis Group, p. 11

[92]Comments of the Colorado Public Utilities Commission.

years of local ratemaking. In reality, the Commission lacks the tools and the expertise to rebalance intrastate rates as competition is introduced."[93]

For example, "[i]n some exchange in Alaska, residential rates are partially supported by competitive or discretionary services. It is unclear how or if the FCC's wholesale pricing methodology can consider this aspect of local rate design. Wholesale interconnection rates may someday be higher than local residential rates. If retail rates are based on wholesale rates, FCC's explicit national pricing rules would determine a state's ability to set reasonable retail rates." Comments of the Alaska Public Utilities Commission, p. 5.

No valid public policy supports such national pricing principles either.[94] "No economic principle that we know of says that inputs to any product must cost the same from one State to the next for competition to flourish."[95] "Having such uniform competitive intrastate rates might 'ease recordkeeping and other administrative burdens' indeed, but if Congress had wished to elevate this comparatively trivial concern over principles of Federalism and competition, it could have done so by explicitly preempting all State regulation of rates -- and all negotiated prices -- in the local exchange."[96] "...[T]here is no reason to conclude that Congress intended that prices be same in New York City and in Circle, Alaska."[97] If uniformity of rates were considered the key element by Congress, it would have made express provision for this and

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[93]Comments of Pacific Telesis at p. 64.

[94]Pacific Telesis Comments at p. 63.

[95]Pacific Telesis Comments at p. 63.

[96]Id. at p. 63.

[97]New York State Department of Public Service Initial Comments at p. 11.

would have given a state the authority to reject an agreement if its prices were inconsistent with those established by the FCC as the "national norm" Congress did not act in this manner and hence it must be presumed that it did not intend for there to be uniform rates between jurisdictions.[98]

It is critical that States retain oversight to determine costs and set the prices of local exchange services, and enforce the statutory distinctions between interconnection, network elements, wholesale services, and transport and termination of local calls.[99]

In summary, development of a national pricing and costing standard will hamper the states in establishing a delicate balance between pricing for interconnection, resale, and unbundling and the continued effort to maintain universal service. Each state will have to address these questions based on the state's local companies' networks, costs, and operations of providing local service.[100] The Commission could not possibly evaluate and determine, in the timeframe allowed under the Act, the pricing and costing methodologies which may be appropriate in each jurisdiction.

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[98]See Comments of the New York State Department of Public Service at p. 11.

[99]Comments of Pacific Telesis Group at 7

[100]Florida Public Service Commission Comments at p. 26.

V. Conclusion.

In conclusion, in lieu of a highly prescriptive approach, the Act and the record in this proceeding support the adoption of rules by the FCC which incorporate and accommodate state procompetitive policies. The FCC should not prescribe national rules to implement the pricing and costing provisions under § 252 of the Act, but rather should leave this responsibility to the states.

Respectfully submitted,

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